Supreme Court, U.S.
FILED

001230 JAN 29 2001

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No. 00-

IN THE

Supreme Court of the United States

DOUGLAS SLOAN,

Petitioner,

v.

CARROLL CHRISTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioner, an incarcerated Canadian citizen, was convicted in New Jersey of domestic violence, being subjected to criminal prosecution as well as incarceration for any violation of that domestic violence restraining order, in violation of petitioner's Fourteenth Amendment due process rights because petitioner was not informed that he had a right to obtain counsel to defend him and was relegated to attempting to defend himself at the trial.

2. Whether petitioner's Fourteenth Amendment due process rights were violated at the domestic violence trial since he was cross-examined and convicted on the basis of the trial Judge's *ex parte* review of and reliance on an undisclosed police report.

3. Whether the domestic violence conviction of an unrepresented defendant which is based on conduct that consisted solely of constitutionally protected expression and one act of constitutionally protected travel, with no approach to the alleged victim closer than 20 miles, constitutes a violation of petitioner's First Amendment expressive rights or his Fourteenth Amendment due process rights.

4. Does either the Judge's failure in a domestic violence trial to advise an unrepresented defendant of his right to confront and cross-examine the witnesses against him or the Judge's foreclosure of such cross-examination constitute a violation of petitioner's Fourteenth Amendment due process rights of sufficient magnitude to require reversal of a domestic violence conviction which is based only on proof by a preponderance of the evidence.

5. Whether the failure of a Judge or his staff in a domestic violence hearing to inform an unrepresented and incarcerated defendant of his right to appeal (or reconsider) the domestic violence conviction and the time limit for each procedure is a violation of petitioner's Fourteenth Amendment due process rights so as to constitutionally require that any appeal from, or motion for reconsideration of, that conviction be deemed timely?

PARTIES TO THE PROCEEDINGS

Petitioner is Douglas Sloan, a Canadian citizen residing in Ontario. Respondent is Carroll Christy, formerly a resident of Millville, New Jersey and now residing in northern New Jersey.

On petitioner's appeal to the New Jersey Superior Court, Appellate Division as well as all proceedings thereafter, the State of New Jersey was noticed of and participated in those proceedings, participating counsel being Susan Novick, Assistant Cumberland County Prosecutor.

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Petitioner Douglas Sloan respectfully petitions for a Writ of Certiorari to review the decision of the New Jersey Superior Court, Appellate Division in this case.

OPINIONS BELOW

The decision of the Superior Court of New Jersey, Appellate Division is found at Appendix A. The bench opinion of the Family Court of New Jersey on Motion for Reconsideration/Dissolution/New Trial is found at Appendix B. The bench opinion after the domestic violence trial is found at Appendix C and the July 10, 1996 Final Restraining Order entered after the conclusion of that trial is found at Appendix D. The Judgment/Order of the Supreme Court of New Jersey denying the petition for Certification and dismissing the Appeal from the Superior Court of New Jersey, Appellate Division is found at Appendix E.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. The Judgment/Order of the Supreme Court of New Jersey denying certification to and dismissing appeal from the decision of the Superior Court of New Jersey, Appellate Division was entered on October 31, 2000.

Notification required by Rule 29.4(c) that 28 U.S.C. § 2403(b) may apply has been satisfied and copies of the petition shall be served on the Attorney General of New Jersey. As reflected above, the State has been noticed on and participating in this matter since the briefing and oral argument before the New Jersey Superior Court, Appellate Division through the Cumberland County Prosecutor's office.

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

This case involves the First Amendment and the Fourteenth Amendment to the United States Constitution.

The First Amendment states in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment states in pertinent part:

> No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The pertinent parts of New Jersey's "Prevention of Domestic Violence Act of 1990" state:

N.J.S. 2C: 25-28. Filing Complaint in Family Part of the Chancery Division; Emergency Relief.

> a. A victim may file a complaint alleging the commission of an act of domestic violence with the Family Part of the Chancery Division of the

Superior Court in conformity with the rules of court. . . . Filing a complaint pursuant to this section shall not prevent the filing of a criminal complaint for the same act.

* * *

c. The clerk of the court, or other person designated by the court, shall assist the parties in completing any forms necessary for the filing of a summons, complaint, answer or other pleading.

d. Summons and complaint forms shall be readily available at the clerk's office, at the municipal courts and at municipal and State police stations.

e. As soon as the domestic violence complaint is filed, both the victim and the abuser shall be advised of any programs or services available for advice and counseling.

f. A plaintiff may seek emergency, ex parte relief in the nature of a temporary restraining order. A municipal court judge or a judge of the Family Part of the Chancery Division of the Superior Court may enter an ex parte order when necessary to protect the life, health or well-being of a victim on whose behalf the relief is sought.

N.J.S.2C:25-29. Procedure upon Complaint.

a. A hearing shall be held in the Family Part of the Chancery Division of the Superior Court within 10 days of the filing of a complaint

pursuant to section 12 of P.L. 1991, c.261 (C.2C:25-28) in the county where the ex parte restraints were ordered, unless good cause is shown for the hearing to be held elsewhere. A copy of the complaint shall be served on the defendant in conformity with the Rules of Court. If a criminal complaint arising out of the same incident which is the subject matter of a complaint brought under P.L.1981, c.426 (C.2C:25-1 et seq.) or P.L.1991, c.261 (C.2C:25-17 et seq.) has been filed, testimony given by the plaintiff or defendant in the domestic violence matter shall not be used in the simultaneous or subsequent criminal proceeding against the defendant, other than domestic violence contempt matters and where it would otherwise be admissible hearsay under the rules of evidence that govern where a party is unavailable. At the hearing the standard for proving the allegations in the complaint shall be by a preponderance of the evidence.

* * *

d. Upon good cause shown, any final order may be dissolved or modified upon application to the Family Part of the Chancery Division of the Superior Court, but only if the judge who dissolves or modifies the order is the same judge who entered the order, or has available a complete record of the hearing or hearings on which the order was based.

N.J.S. 2C:25-30. Violation of Orders.

Except as provided below, a violation by the defendant of an order issued pursuant to this act shall constitute an offense under subsection b. of N.J.S.2C:29-9 and each order shall so state. All contempt proceedings conducted pursuant to N.J.S.2C:29-9 involving domestic violence orders, other than those constituting indictable offenses, shall be heard by the Family Part of the Chancery Division of the Superior Court. All contempt proceedings brought pursuant to P.L. 1991, c.261 (C.2C:25-17 et seq.) shall be subject to any rules or guidelines established by the Supreme Court to guarantee the prompt disposition of criminal matters. Additionally, and notwithstanding the term of imprisonment provided in N.J.S. 2C:43-8, any person convicted of a second or subsequent nonindictable domestic violence contempt offense shall serve a minimum term of not less than 30 days. Orders entered pursuant to paragraphs (3), (4), (5), (8) and (9) of subsection b. of section 13 of this act [2C:25-29] shall be excluded from enforcement under subsection b. of N.J.S.2C:29-9; however, violations of these orders may be enforced in a civil or criminal action initiated by the plaintiff or by the court, on its own motion, pursuant to applicable court rules.

N.J.S. 2C:33-4 Harassment.

Except as provided in subsection d. and e., a person commits a petty disorderly persons offense if, with purpose to harass another, he:

a. Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;

b. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or

c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

The pertinent parts of the Rules Governing the Courts of the State of New Jersey state:

R. 5:3-4. Counsel: Appearance; Prosecutor [as of July 10, 1996]

a. Right to Counsel; Public Defender; Assignment of Counsel. In all matters the parties shall have the right to be represented by counsel.

R. 3:4-2. Procedure After Filing of Complaint [as of July 10, 1996].

a. Indictable offenses.

b. Non-Indictable Complaints. At the defendant's first appearance before the court following the filing of a complaint, the judge thereof shall inform the defendant of the charges and, shall furnish the defendant with a copy thereof. The judge shall also inform the defendant of the right to remain silent and that any statement made may be used against the defendant. The judge shall inform the defendant of the right to retain counsel or, if indigent and constitutionally or otherwise entitled by law to counsel, of the right to be represented by assigned counsel.

STATEMENT OF THE CASE

Petitioner Douglas Sloan, a citizen and resident of Canada, met respondent Carroll Christy, a United States citizen and resident of Millville, New Jersey, in Canada in August 1995 and they dated for seven months. On March 17, 1996, respondent precipitously terminated the relationship while petitioner was visiting at her home in New Jersey. Respondent drove petitioner to the Philadelphia airport where he flew back to Canada that evening. Between March 22 and March 27, 1996, petitioner telephoned or attempted to telephone respondent numerous times, against her instructions, in an attempt at reconciliation. Between April 1 and June 29, 1996, petitioner phoned her business office perhaps six times and sent her about a dozen letters in further attempts at reconciliation. Respondent accepted some of the letters but returned others, marked "Refused". Petitioner, believing that the cause of the breakup was his common-law relationship with another woman in Canada, took steps to extricate himself from that relationship and on June 25, 1996 had his Canadian solicitor formalize a separation agreement with that woman

and send a fax to respondent advising of the separation agreement, conveying petitioner's desire for a rapprochement and requesting a meeting in New Jersey on or after June 29, 1996. Respondent did not reply to this fax.

Petitioner drove from Ontario, Canada reaching Millville, New Jersey on June 29, 1996 and first approached respondent's ex-brother-in-law, to ask for intercession. On being rebuffed petitioner presented himself to the Millville Police Department, with a three-page statement outlining the course of the relationship, breakup and subsequent events (marked Exhibit P-17 at July 10, 1996 trial, transcript of trial referred to as FHT). After some discussion, a police officer advised him to leave Millville and to avoid respondent. Petitioner left Millville and on July 2, 1996 drove to Voorhees State Park, some 20 miles from respondent's office, and mailed letters and postcards to her. He made arrangements to camp for the week at that State Park. The letters and postcards notified respondent of his location and invited her to meet him there.

On June 30, 1996 a handwritten Domestic Violence (DV) Complaint was processed charging petitioner with harassment and an *ex parte* temporary restraining order was issued. The DV complaint alleged that petitioner's Domestic Violence harrassment had endangered plaintiff's life, health, or well being by "contacting the victim by phone, letters and coming to the country via car". The Domestic Violence Complaint acknowledged that there was no previous history of physical abuse.

Petitioner was located at Voorhees State Park on July 3, 1996 and served with the Domestic Violence Complaint and Temporary Restraining Order. Later that day he was arrested

on a criminal complaint and warrant charging him with stalking and taken to the Cumberland County jail, where he remained incarcerated for 48 days. On July 10, 1996 Petitioner was brought from the jail to Family Court for a hearing before a Judge who convicted him of Domestic Violence harassment and entered a Final Restraining Order, to be permanent for petitioner's life.

At the Domestic Violence trial, petitioner's complaint that he was not allowed to bring evidence from his cell was rejected by the Judge. Nor was petitioner advised of his right to counsel or asked if he waived that right. At the conclusion of respondent's testimony, the judge instructed petitioner thusly: "Mr. Sloan, you've heard her testimony at this point in time. You can make a statement and testify if you want, or you can just remain silent. That's your prerogative. This is not a criminal court. This is a quasi-criminal matter so you can decide what you want to do.", FHT23-19 to 23. Petitioner was not advised of his right to confront and cross-examine the respondent nor was he asked if he waived that right. He was not advised of the elements of the harassment statute that he was alleged to have violated even though he denied knowing why he was there. The Judge concluded, without supporting evidence, that petitioner had been advised of the harassment law by his Canadian solicitor and by a New Jersey attorney whom petitioner had consulted after the acts of alleged harassment. After he was convicted petitioner was not advised of his right to appeal or seek reconsideration or the applicable time limit for either procedure.

During the trial, the Judge interrupted petitioner's attempted testimony with remarks, such as, "I don't need to hear that — it is in your statement" or "that's just repetitive." As

a result, much of the testimony petitioner would have presented was not permitted. The Judge admitted and relied on hearsay testimony by respondent and gave it precedence over petitioner's testimony, even in cases where respondent had no personal knowledge.

At the trial respondent acknowledged that there had been no physical abuse or conduct by petitioner which would lead her to expect such. She made no allegations that petitioner had attempted to conceal his identity in any of his communications, that he had used profane, lewd, threatening or offensively coarse language or that he had called at extremely inappropriate times. Nor did she allege that petitioner had been within physical or visual proximity of her at any time after the breakup. In several colloquies both she and the Court acknowledged that petitioner's purpose was reconciliation:

> THE COURT: "[D]uring the month of March, all those phone calls to your house, what were the nature of them?"
>
> MS CHRISTY: They were rambling, would I marry him, he had composed some kind of contract [to buy] my house, my house is for sale, that he would buy my house and pay half of it."
>
> (FHT 8-11 to 15)
>
> THE COURT: "Okay. Would you characterize these rambling type phone calls during the month of March, these numerous phone calls as trying to get you back, get your relationship —"

MS CHRISTY: "Yes."

Q: "And then how would you characterize the phone calls at work? Same type?"

A "Yes he wanted to talk with me."

(FHT 9-1 to 7)

THE COURT: "Okay. How would you characterize the letters?"

MS CHRISTY: "Rambling, repetitive, attempts to reconcile . . ."

(FHT 18-21 to 23)

THE COURT: ". . . I can tell and say for the record that after reading them [the letters] that I characterize them as an individual that believes he was in a very loving relationship, passionate relationship that had ended and to characterize it, they are rambling, but they are also of the same tone that he can't get over the relationship being over, he acknowledges that he was told the relationship was over, he also acknowledges that he may appear to be rambling, appear to be pathetic at times, but it is an attempt on his part he indicates, to try to get an answer as to why all of a sudden the relationship is over. That would basically characterize what I've read. It also appears that the letters have a continuing pattern; they have a continuing theme, a continuing same type of format. 'My dearest friend and love,'

> usually says the same, signed by — the signature block usually has some kind of notation before the signature block which indicates that he's praying, that he's in despair," FHT 22-10 to 23-1.

The only statement by petitioner, which gave cause for concern to respondent Christy, follows:

> MS. CHRISTY: "He wanted to know if I was jerking him around. He said that — he said remember what I said about not holding a grudge against you? And I said, yes. And he said, well, I take it back. And that scared me to death.
>
> FHT 10-19 to 22

The Judge rejected petitioner's attempt to present his side of that phone conversation in which this alleged statement was made (FHT 24-14; 27-10 to 28-24; 34-15). What petitioner was permitted to say was that Ms. Christy had unjustifiably accused him of sexual infidelity in this conversation and would not hear his protestations of innocence. He would have testified (had he been given the chance) that he was merely reacting to respondent's accusation. Taking back a promise not to hold a grudge in such circumstances is hardly alarming. This, moreover, is the harshest statement petitioner was alleged to have made to respondent.

The only evidence cited in support of the Court's finding that petitioner's purpose was to harass was, apparently, the number of letters and phone calls. As the Judge put it, petitioner "would not take no for an answer." FHT 42-6 to 12. The Judge also cited as additional evidence to support

the charge of harassment, conduct which occurred after the date (June 29, 1996) alleged in the DV Complaint, privileged communications between petitioner and a Collingswood, New Jersey attorney, hearsay as to those discussions as well as hearsay as to petitioner's discussions with a Millville police officer, FHT 42-12 to 43-13.

The Family Court Judge cross-examined petitioner as to his contact with the Millville police officer and apparently relied on a copy of the Millville police report, which had been faxed to the Family Court. That Millville police report was never acknowledged or identified by the Judge during the trial. It is one of two documents identified as Exhibit P-17 in the handwritten Final Restraining Order (Appendix D at 20a) although only petitioner's typed statement was marked and specifically identified by the Judge as Exhibit P-17 at the trial, FHT 31-5 to 15; 41-13 to 23.

The respondent was assisted at the hearing by a domestic violence counselor pursuant to the Domestic Violence Statute, N.J.S.A. 2C: 25-28(c), which mandates that assistance be provided to the parties (Appendix D at 18a). No assistance, however, was provided to petitioner, either in advising him of his rights at trial or his rights to appeal from or seek reconsideration of the domestic violence conviction.

At the July 25, 1997 hearing on the motion for reconsideration, petitioner, through retained counsel, argued that the final restraining order was void for convicting petitioner for constitutionally protected conduct and also should be vacated because of the various due process violations raised in this petition, i.e. notice of right to counsel, to cross-examine and to appeal as well as improper reliance

on an undisclosed police report, see retained counsel's 41 page brief filed on June 27, 1997 with Motion for Reconsideration/Dissolution/New Trial. Counsel also relied on the new evidence that had become available as a result of respondent's testimony at the Grand Jury on August 6, 1996 that was not available at the time of the restraining order hearing, particularly respondent's acknowledgement that petitioner had correctly discerned the cause of the breakup which led to petitioner's attempts at reconciliation and his "dissolution" of his "common law" marriage in Canada.

In denying the reconsideration/dissoulution/new trial motion, the Family Court Judge acknowledged "probably" petitioner's "most important" argument that "for constitutional reasons, due process", that relief should be granted and then failed to address that argument, Appendix B at 8a. The Judge also found that petitioner had not complied with the 45 (or 20) day deadline for appeal (or motion for reconsideration), ibid.

On appeal, the New Jersey Superior Court, Appellate Division acknowledged but refused to consider any of petitioner's constitutional arguments, citing the untimeliness of petitioner's reconsideration motion and petitioner's failure to timely appeal the July 10, 1996 Final Restraining Order, Appendix A at 3a, 4a. Petitioner's appeal of right on the constitutional questions was dismissed by the New Jersey Supreme Court, Appendix E.

REASONS FOR GRANTING THE WRIT

It is clear that some, but not all, criminal defendants as well as most, if not all, civil defendants have no due process constitutional right to appointed counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Scott v. Illinois*, 440 U.S. 367 (1979); *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981). But do not all those defendants, informed that they have no constitutional right to appointed counsel, just as clearly have a due process constitutional right to be informed that counsel may be retained to defend them in their criminal or civil prosecutions? New Jersey's Court Rules inform the reader of the right to retain counsel (R. 5:3-4) but New Jersey does not inform its domestic violence defendants in its Courtrooms of that right. Is that theoretical/practical dichotomy constitutional, asks this petitioner, a Canadian citizen.[1]

And, because petitioner was not advised that he had the right to retain his own counsel, petitioner was convicted of domestic violence in a hearing that violated nearly every constitutional right available in the legal process in the United States. He was convicted without establishment of any of the elements of the harassment or domestic violence statutes, for conduct that was wholly protected by the First Amendment freedom of speech and the Fourteenth Amendment freedom of travel. He was denied proper notice of the hearing, of the charges against him, of discovery, of adequate time for preparation, of the right to counsel, of the right to confront and cross-examine, of the right to present

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1. The Fourteenth Amendment's due process protections extend to aliens, *Truax v. Raich*, 239 U.S. 33 (1915) as do our First Amendment rights, *Bridges v. Wixon*, 326 U.S. 135 (1945), *cf. Underwager v. Channel 9 Australia*, 69 F.3d 261 (9th Cir. 1995).

evidence, of the right to be shown all evidence against him, of the right to be informed of his right and time to appeal, and the right to an impartial arbiter.

The New Jersey Domestic Violence Statute, N.J.S.A. 2C:25-29, is designated civil but is found in New Jersey's Criminal Code. Failure to obey the restraining orders that result from application of the statute puts a defendant at risk of criminal sanctions, which can be considerably more onerous than that for harassment, a disorderly person's offense, N.J.S.A. 2C:33-4. Further the statute provides that "testimony given by the plaintiff or defendant in the domestic violence matter shall not be used in [criminal proceedings] other than domestic violence contempt matters . . .". This provision ensures that any testimony from a domestic violence hearing is part and parcel of any subsequent criminal contempt hearing for alleged violations of the restraining order and may not be challenged at the trial of those alleged violations. Conviction of harassment in the context of the Domestic Violence Act thus gives rise to a disability or legal disadvantage that is only supposed to result from conviction for a crime. A restraining order thus becomes a presumption of guilt in a criminal prosecution and lowers the burden of proof required by the prosecution.

Civil judgements are not generally admissible in criminal proceedings. A civil judgement that is admissible in criminal court is a criminal conviction in substance. Petitioner respectfully submits that the civil designation of the Domestic Violence Statute is legislative legerdemain. The civil designation simply permits convictions with less than the criminal standard of proof.

There is not immediate incarceration on a conviction of domestic violence but the restraining order enjoins not only further offenses of the same sort but contact of any kind, even through third parties, and any physical proximity "in all locations." This overly broad injunction acts substantially like a life term of criminal probation. As in probation, any violation, even if inadvertent, may lead to immediate incarceration on a criminal charge (contempt), with no possibility at that time of challenging the validity of the Order or of the evidence and testimony introduced at the Final Restraining Order hearing.

To be convicted under New Jersey's Domestic Violence statute one must be found guilty by a preponderance of the evidence of violating one of 14 criminal statutes and to be an immediate danger to the person or property of the plaintiff/ victim. A person convicted of domestic violence carries the stigma of "abuser" for the rest of his/her life and that stigma will detrimentally affect subsequent attempts to form new relationships, especially since the proceedings are held in public and no effort is made to keep them confidential.

Domestic violence is receiving more attention in the last few years, *see United States v. Morrison*, __ U.S. __, 120 S. Ct. 1740, at 1760 nn. 2, 3 and Fagan, Nat'l Inst. Of Justice, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS (1996). Similar to the observations by this Court in *Application of Gault*, 387 U.S. 1 (1967) and *In re Winship*, 397 U.S. 358 (1970) a domestic violence "abuser", like a "juvenile delinquent", is faced with proceedings termed civil, stigmatized with a label, and subjected to loose procedures which are well intentioned. This petitioner's domestic violence trial, similar to Gerald Gault's hearing, provided no advice of the right to retain counsel, precluded

confrontation and cross-examination of witnesses and by not advising of a right to appeal, likewise foreclosed appellate review. At least, with Gerald Gault there was a habeas corpus procedure available to collaterally review his conviction. With this petitioner, there is no similar relief. It is also true that petitioner was not subjected to imprisonment for a lengthy period as were juveniles Gault and Winship. However, the minimal due process protection implicated here is simply the right to be informed of the right to retain counsel. There is no claim of a right for appointed counsel. Because counsel was not retained, all of the other constitutional safeguards were likewise violated.

This petition presents significant issues concerning the existence of any constitutional rights of a defendant in a domestic violence accusation. Where a restraining order lasts for the defendant's lifetime and has criminal consequences, acting like a life term of criminal probation, where it may induce a presumption of guilt and where its evidence and testimony may not be challenged in any subsequent criminal proceeding, where it has a detrimental effect on the defendant's reputation and constitutional liberties, should not the violation of one or more of the defendant's fundamental due process rights under the Fourteenth Amendment call out for this Court's attention at this time. The violations involved here will continue until corrected by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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